Toffoloni v. LFP Publishing Group, LLC Doc. 59

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA

MAUREEN TOFFOLONI, as Administrarix and Personal Representative of the ESTATE OF NANCY E. BENOIT,	)	
Plaintiff,	)	
v.	)	CIVIL ACTION FILE NO. 1:08-CV-0421-TWT
LFP PUBLISHING GROUP, LLC, d/b/a Hustler Magazine, MARK SAMANSKY, an Individual, and other distributors and sellers of, Hustler Magazine, as Defendants X, Y, and Z,	)	
Defendants.	)	

PLAINTIFF'S REPLY IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT AND RESPONSE TO DEFENDANT'S MOTION FOR EXTENSION OF TIME

COMES NOW, Plaintiff, Maureen Toffoloni, as Administratrix and Personal Representative of the Estate of Nancy E. Benoit ("Plaintiff"), through counsel, and files this her Response to Defendant LFP Publishing Group, LLC's Response to Motion for Partial Summary Judgment as to Liability and Response to Defendant's Motion for Extension of Time with this Court as follows:

Dockets.Justia.com

Defendant, LFP Publishing Group, LLC d/b/a Hustler Magazine ("Hustler") has filed a non-response to Plaintiff's Motion for Partial Summary Judgment as to Liability. Hustler claims in its non-response (and in its companion Motion for Extension of Time) that it needs "discovery" to find out whether certain essential facts alleged by the Plaintiff, Nancy Benoit's mother and personal representative, are true. Hustler has outlined what it contends are essential facts requiring discovery before it can respond to Plaintiff's Motion. For the reasons set forth hereinbelow, Hustler's latest filings are simply its latest attempts at foot-dragging and delay, and should be treated as such by this Court. Hustler's liability to Plaintiff for its outrageous conduct is clear. There are no genuine issues of material fact in this case with respect to the Defendant's liability for violation of Plaintiff's right to publicity. Based upon the decision in this case by the Eleventh Circuit Court of Appeals, Hustler is absolutely liable to Plaintiff for violation of her right of publicity. Unless and until the Supreme Court of the United States takes a different position, the only issues left to be tried are Plaintiff's compensatory damages; punitive damages against Hustler for its outrageous conduct, and Plaintiff's attorneys' fees.

ARGUMENT AND CITATION OF AUTHORITY

As this Court may recall, this case began on February 5, 2008 when Plaintiff filed a detailed, verified Complaint, with sworn exhibits and the affidavits of Maureen Toffoloni and James Daus. The Verified Complaint was filed in the Superior Court of Fayette County, the court in which Nancy Elizabeth Benoit's Estate is being administered. See Verified Complaint and Exhibits A, B, C, and D attached thereto. This case was removed by the Defendants to this Court on February 7, 2008.

The Verified Complaint, which constitutes evidence by way of sworn testimony, states the following facts:

(1) Maureen Toffoloni is the duly appointed personal representative of the Estate of Nancy Elizabeth Benoit;

(2) The Estate owns and controls the right of publicity with respect to Nancy E. Benoit's image;

(3) On January 16, 2008, the Estate notified Hustler that the Estate owns and controls the right of publicity as to Nancy's image; and

(4) Advised Hustler that Hustler should not publish images of Nancy E. Benoit without permission and/or compensation.

Also attached to the Verified Complaint was a sworn copy of a letter from counsel for Hustler in which Hustler claimed that it had the legal right to publish images of Nancy E. Benoit without permission or compensation, because the images were "newsworthy." *See* Exhibits C and D to the Verified Complaint.

The Verified Complaint alleged certain other non-material facts, including that on the day the images were created, Nancy had instructed the photographer not to publish the images; that the photographer told Nancy that he had destroyed the images; and other non-material matters.

In the face of this sworn testimony, Hustler chose to stick with its position that it had a First Amendment right to publish these images, without permission or compensation, because they were "newsworthy." Hustler removed the lawsuit to this Court on diversity grounds and filed a non-sworn Motion to Dismiss asserting this legal position. As this Court knows, the Eleventh Circuit unanimously disagrees with Hustler's position. *See* *Toffoloni v. LFP Publishing Group, LLC d/b/a Hustler Magazine*, *supra*.

It has never been seriously disputed that Nancy Benoit's Estate owns and controls the use of her image. The Verified Complaint conclusively establishes that Nancy Benoit's Estate owns her image, and this verified fact has not been controverted. It is also undisputed that Hustler published images of Nancy without the permission of or compensation to her Estate. It is now clear that the images were not "newsworthy." Hustler's effort to create an issue of "fact," where none exists, should be dealt with summarily by this Court.

The legal status of a verified complaint under federal case law and procedure is that, if constructed with the formality of an affidavit, the verified complaint constitutes sworn testimony. *Schroeder v. McDonald*, 55 F.3d 454, 460 (9th Cir. 1995) "a verified complaint may be used as an opposing affidavit under Rule 56." Thus, the present posture of the case is that Plaintiff has offered evidentiary proof (her sworn testimony) that:

(1) she is the duly authorized personal representative of the Estate of Nancy Elizabeth Benoit; and

(2) The Estate owns and controls the use of Nancy's images.

In response, Hustler has done nothing to contradict this testimony, even though Plaintiff's evidence has been known to Hustler for more than 21 months. Hustler has apparently done no investigation, taken no statements, obtained no affidavits, and has not provided anything to contradict Plaintiff's testimony that she is the representative of her daughter's Estate and that the Estate owns and controls the use of Nancy's image.

It is fundamental federal procedure that, when a party is confronted with a motion for summary judgment which has been made and supported with evidentiary materials, a party cannot merely rely upon the allegations in its pleadings, but must come forward affirmatively with evidence which creates an issue of fact as to at least one essential element in the plaintiff's complaint. Fed. R. Civ. P. Rule 56(e)(2) "An opposing party may not rely merely on allegations or denials in its pleadings." _Ellis v. England_, 432 F.3d 1321, 1326 (11th Cir. 2005) "mere conclusions and unsupported factual allegations are legally insufficient to defeat a summary judgment motion."

In this case, Hustler has sought to avail itself of the Rule 56(f) alternative, claiming that it needs "time," apparently to "discover" whether Plaintiff is in fact the Personal Representative of her daughter's Estate, notwithstanding Plaintiff's sworn testimony to that fact. In response to this, Plaintiff's position is simple: it would have taken Hustler about five minutes (at most) to check with the Fayette County Probate Court to find out if Ms. Toffoloni has lied to this Court about her appointment as Personal Representative of Nancy's Estate. In fact, Hustler has had more than 21 months to check out this fact, but has apparently chosen not to do so. Hustler has, and has always had, unrestricted access to Fayette County Probate Court records. No time for discovery is needed, because no discovery is necessary.

In like manner, 21 months ago, Mrs. Toffoloni swore that the Estate which she represents owns and controls the use of Nancy's image. Mrs. Toffoloni has apparently perused her daughter's personal papers and has seen no indication that Nancy ever conveyed these rights to some unknown third party. In the two years since her death, no one has come forward to claim that they own the exclusive, permanent, perpetual right to the use and control of Nancy's image. Counsel for Plaintiff is unaware how else Mrs. Toffoloni could "prove" this fact, other than by her testimony, which she gave 21 months ago. In contrast, in the 21 months since Mrs. Toffoloni gave that testimony, if Hustler had investigated and come up with someone who claimed to own and hold the exclusive right to use Nancy's image, presumably an affidavit or deposition, could have and would have been obtained by Hustler to contradict Mrs. Toffoloni's testimony, or at least create a genuine issue of material fact. Instead, Hustler has done nothing, or has done a lot, with no favorable result. In either case, no additional time is required.

As it stands today, the following facts are uncontradicted:

(1) Mrs. Toffoloni is the Personal Representative of the Estate of Nancy Elizabeth Benoit;

(2) The Estate of Nancy Elizabeth Benoit owns and controls the right of publicity with respect to images of Nancy Elizabeth Benoit;

(3) Hustler has admitted that it published images of Nancy Elizabeth Benoit in its March 2008 edition of *Hustler* Magazine;

(4) Hustler has admitted that it never sought or obtained permission from the Estate to publish these images;

(5) Hustler has admitted that it never compensated the Estate for its use of these images; and

(6) The Eleventh Circuit Court of Appeals has said that this conduct violates Plaintiff's right of publicity.

Thus, under *Toffoloni v. LFP Publishing Group, LLC d/b/a Hustler Magazine*, 572 F3d 1201 (11th Cir. 2009) a *prima facie* case for the Defendant's violation of Plaintiff's right of publicity has been established. There is no reason to delay the entry of partial summary judgment as to liability against the Defendant, or to grant the Defendant additional time to "discover" material facts genuinely in dispute. There simply are none.

Hustler's Motion for Extension of Time should be denied, and Plaintiff's Motion for Partial Summary Judgment as to Liability should be granted.

Respectfully submitted November 17, 2009.

/s/ Richard P. Decker
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MAUREEN TOFFOLONI, as Administrarix and Personal Representative of the ESTATE OF NANCY E. BENOIT, Plaintiff, v. LFP PUBLISHING GROUP, LLC, d/b/a Hustler Magazine, MARK SAMANSKY, an Individual, and other distributors and sellers of, Hustler Magazine, as Defendants X, Y, and Z, Defendants.	)))))))))))))))))	CIVIL ACTION FILE NO. 1:08-CV-0421-TWT

CERTIFICATE OF SERVICE

This is to certify that on November 17, 2009, I have electronically filed the foregoing Plaintiff's Reply in Support of Motion for Partial Summary Judgment and Response to Defendant's Motion for Extension of Time with the Clerk of Court using the CM/ECF system which will automatically send email notification of such filing to the following attorney(s) of record:

James Clifton Rawls, Esq.
S. Derek Bauer, Esq.
Barry J. Armstrong, Esq.
Darrell Jay Solomon, Esq.
Jeffrey F. Reina, Esq.
Paul J. Cambria, Esq.

and by placing a copy of same in the United States Mail in a properly addressed envelope with adequate postage thereon to:

William M. Feigenbaum, Esq.
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/s/ Richard P. Decker
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